INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	
First	2
Second	3
Third	4
Fourth	5
Statute involved	5
Statement	5
Reasons for granting the writ:	
I. Employer's right to comply with employee's legal demand made with threat of strike. Oral "closed shop agreement" valid	10
II. A Georgia Collective Bargaining Agreement should be construed according to the laws of Georgia and not "the general law"	13
III. The National Labor Relations Board has discretion to deny back pay	15
IV. What is a ship owner's duty in regard to permitting union delegates to board its vessels?	17

CITATIONS

Cases:	
Cape Cod Trawling Corporation, 23 N.L.R.B.—pamphlet Number 18	15, 16, 17
Cities Service Oil Co. et al N.L.R.B. Nos. C 1270-72 July 3, 1940, U.S. Law Week Vol. 9, Sec. 2, p. 2037 July 16, 1940	18
Erie Railroad Company vs *Tompkins*, 304 U.S. 64	13, 14
Gary vs *Central of Georgia Railway Company* 44 Ga. App. 120	14
Holmes vs *Jennison*, 14 Peters 540	12
Illinois Central Railroad Company vs *Moore*, 112 Fed. (2d) 959	14, 15
Moore vs *Illinois Central Railroad Company*—U.S. — No. 550 this Term	15
Mooremack Gulf Lines, Inc. N.L.R.B. Nos. c 1392-3 January 4, 1941 not yet reported	17
National Labor Relations Board vs *Phelps Dodge Corporation* —U.S.— No. 641 this Term	17
National Labor Relations Board vs *Waterman* 309 U.S. 206	6, 13, 14
Six Companies of *California* vs *Joint Highway District* —U.S.— No. 267 this Term	13
U.S. vs *Hutcheson* —U.S.— No. 43 this Term	11
Statute:	
National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat, U.S.C. Supp. Title 29 Sec. 151 seq.)	
Sec. 8	3, 12
Sec. 13	11
Miscellaneous:	
American Law Institute's Restatement of the Law of Torts §790	11

32506

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No._____

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

vs

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, South Atlantic Steamship Company of Delaware, respectfully prays that a writ of certiorari issue from this Honorable Court to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit entered February 13, 1941, (R. Vol. I p. 199) in a cause there numbered 9491, in so far as that decree refused to review and set aside an order of the National Labor Relations Board and required petitioner to cease and desist from certain actions and to take certain affirmative actions, including an offer of rein-

statement and back pay to twenty-three (23) seamen formerly employed by petitioner as members of the crew of the S/S "Saccarappa", and to comply with the said order of the National Labor Relations Board.

OPINION BELOW

The opinion of the Court below (R. Vol. I p. 175) is reported in 116 Fed. (2d) page 480. The findings of fact and conclusions of law of the National Labor Relations Board (R. Vol. I p. 121) are reported in 12 N.L.R.B. 1367. The Intermediate Report of the Trial Examiner (R. Vol. I p. 64) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28 §347 United States Code) and under Section 10 (e) and (f) of the National Labor Relations Act (Title 29 §160 (e) and (f) of the Supplement to United States Code Annotated).

QUESTIONS PRESENTED

One.

When the International Seamens Union, an A. F. of L. affiliate, which was the free and unassisted bargaining agent of an appropriate group of petitioner's employees, demanded with threat of strike etc., that petitioner, the owner of a fleet of six vessels, refuse to reemploy a small minority of such

group (to-wit, the unlicensed members of the crew of one vessel) unless such minority rejoin the Union to which all of the remaining members of the group belonged:

(a) Did Petitioner, by reluctantly yielding to such threat, violate the National Labor Relations Act?

(b) Did the Union and petitioner by reaching an understanding and publicly announcing that petitioner would only reemploy the seamen if they rejoined that Union, make a valid closed shop agreement, as authorized by the Proviso in Title 29 §158 (3) United States Code Supplement, which reads:

> "Provided, that nothing *** shall preclude an employer from making an agreement with a labor organization *** to require as a condition of employment membership therein ***."?

Two.

In 1935, prior to the adoption of the National Labor Relations Act, petitioner, along with other shipping companies, entered into a valid written collective bargaining agreement with the International Seamens Union. The agreement on its face only required petitioner to give preference of employment to members of that Union. The unlicensed crew of the S/S "Saccarappa" had obtained their employment under and by virtue of that contract. The parties intended that petitioner would perform that contract and it was performed at Savannah,

Georgia, the home port of the S/S "Saccarappa" and of petitioner's other vessels.

Should this written contract be construed according to "the general law" or according to the laws of Georgia which hold that the contract contains an implied term that persons who obtain employment under the contract must remain members of the International Seamens Union.

Three.

(a). When the National Labor Relations Board has found that an employer has in violation of the National Labor Relations Act discharged employees, must the Board, without the exercise of any discretion and as a matter of course, order reinstatement with back pay?

(b). Is the award of reinstatement and back pay to be made as a matter of right to the former employees?

(c). What power or discretion has the Board in awarding back pay to the former employees:

1. Where an employer is made the innocent victim of a dispute between rival unions:

2. Where the former employees have in the meantime obtained "regular and substantially equivalent employment."

(d). Whether the Board, in making a back-pay award is required to provide for the deduction of amounts which the recipient could have earned, but did not.

(e). Must the Board make findings to justify an award of reinstatement with back pay?

Four.

The Board having held that because of the peculiar nature of the seamen's employment the ship owner must allow the representatives of the bargaining agent of the crew to board its vessels, what duty is there on the ship owner to allow the representatives of other unions to board its vessels?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to our brief.

STATEMENT

Petitioner owned a fleet of six vessels engaged in the transportation of freight between the home port of Savannah, Georgia, and other ports in the South Atlantic Range from Wilmington, N. C., to Jacksonville, Fla., and certain European ports. Petitioner's financial and operating headquarters were at Savannah, Georgia, which was also the home port of the vessels. (R. Vol. II p. 2).

In 1935, prior to the enactment of the National Labor Relations Act and prior to the organization of the N.M.U., a C.I.O. affiliate, petitioner, along with other shipping companies, entered into an agreement with I.S.U., an A. F. of L. affiliate. (R. Vol. I p. 176; Vol. II p. 127).

Article II of Section 1 of the agreement as construed by this Honorable Court in *N.L.R.B.* vs *Waterman* 309 U. S. 206 merely required that as vacancies occur preference of employment be given members of the I.S.U.

As the Circuit Court of Appeals said: "Within a comparatively short time thereafter all of the seagoing unlicensed personnel, hereafter for brevity designated as seamen, on all of petitioner's ships had become members of the I.S.U.

"On August 3, 1937, shipping articles were signed aboard the steamship Saccarappa at Savannah, Georgia, for a foreign voyage. On September 20, 1937, the ship returned from this foreign voyage and docked at Charleston, South Carolina, and all of the seamen were formally signed off the Foreign Articles and all were paid in full. The ship on September 21 sailed for Wilmington, North Carolina with the same seamen and while at sea, the seamen signed coastwise articles. On September 22, the ship arrived at Wilmington, and while there, an organizer from N. M. U. boarded her and all of the seamen, 23 in number, who had been members of the I. S. U. left that union and joined N. M. U. On September 23, the ship sailed from Newport News, Virginia, to undergo repairs, left Newport on September 30 and arrived in Savannah on October 5, where the seamen were signed off the coastwise articles and paid in full. Word of the change of unions having come to Waid, the rep-

resentative of I.S.U., he notified petitioner that if these men were no longer members of I.S.U. petitioner under its agreement could not sign them on for another foreign voyage. As petitioner was being made the victim of a dispute between rival labor unions and its agreement with I.S.U. would expire on December 31, 1937, petitioner endeavored to obtain Waid's consent to sign the 23 men on for another foreign voyage. This was refused with the threat that if they were signed on, the American Federation of Labor would call a strike of all I.S.U. seamen on petitioner's ships and also of the longshoremen." (R. Vol. I p. 177). 116 Fed. (2) 481—2.

As the Board said: "On the morning of October 6, a United States shipping commissioner refused to permit the entire unlicensed crew of 23 men to sign shipping articles. This was done upon the instructions from the Captain and the I.S.U. agent who were on board and who informed the men that they would not be permitted to make the foreign voyage unless they joined the I.S.U." (R. Vol. I p. 129).

Drews, the Board's chief witness and the N.M.U. ship's delegate testified that on October 6, 1937, he asked Captain Olsen, the Master of the "Saccarappa", why he was getting fired; the Master replied: "Don't you think that you are foolish being a married man and having a family to support to quit now. We have a contract with the I.S.U. which

runs until December. Why don't you join up to the I.S.U. and you can have your job back?" "He told me to tell the other fellows that if they wanted to go back to the I.S.U. to go back into it and they could have their jobs back", and that all of this was in the presence of the rest of the crew, (R. Vol. II pages 5 and 13).

As the Board said: "After the 23 men indicated that they would not follow the Captain's suggestion they were ordered off the ship and left with their belongings." (R. Vol. I p. 129).

On October 11, 1937, Brady, a representative of N.M.U. requested permission to board your petitioner's vessels. (R. Vol I p. 82). This was refused with a statement that a like policy would be followed in regard to the I.S.U. representatives until after an election then pending. This was done. (R. Vol. II p. 17). After the voting of each vessel, Waid was given free access to her, while access was not given to the representative of N.M.U. Waid testified that he had never electioneered aboard a vessel. There was no supervision by any one of Waid's conduct. (R. Vol. I pages 82 and 83). However, his testimony was not contradicted or impeached. Brady desired permission to board the vessels for the purpose of electioneering. (R. Vol. II p. 122).

Based upon these facts your petitioner was tried and convicted by the National Labor Relations Board of violating the National Labor Relations Act. At the trial only five of the former members

of the crew testified. Each of these five had obtained his employment as a member of the crew of the "Saccarappa" under and by virtue of his membership in the I.S.U. (R. Vol. II pages 20, 31, 32, 36, 43, 45, 46, 52, 53, 54, 60, 61, 68, 69).

Four of these witnesses had after October 6, 1937, obtained regular employment; three of them at a higher wage. Three of these four had voluntarily left their new employment to come to the trial. (R. Vol. II pages 16, 42, 43, 51, 52, 58). One left his new employment because his wife was sick. (R. Vol. II p. 59). The unemployed witness had taken a sixty or seventy day vacation at his home in an inland town before attempting to obtain other employment. (R. Vol. II p. 35). Three of the former crew had been reemployed by petitioner. The remaining fifteen men did not testify at the trial and it was testified on their behalf that they were not available because they were out at sea or otherwise away from the place of trial. As to these men there was no evidence of their former earnings and no reliable indication as to whether or not they had obtained any employment from the time of their discharge to the date of the trial. (R. Vol. I p. 137).

In convicting your petitioner the Board made its findings of fact and conclusions of law, and then ordered your petitioner to:

"Take the following affirmative actions which the Board finds will effectuate the policies of the Act";

Offer the former crew reemployment;

Offer the former crew back pay including subsistence from the date of their discharge until they are offered reemployment, less their net earnings during that time.

Grant passes to authorized representatives of the N.M.U. and to other labor organizations of its employees in equal number and under the same conditions as it grants passes to I.S.U. or its successor.

The Board made no finding that it was necessary to award reinstatement or back pay in order to effectuate the policies of the Act. The Board did not find whether or not any former employee had obtained regular and substantially equivalent employment after his alleged wrongful discharge.

The Circuit Court of Appeals for the Fifth Circuit refused to set aside the order and directed your petitioner to take the same action required by the Board. Your petitioner now seeks to have that decision and order of the Fifth Circuit Court of Appeals reviewed for the four reasons stated under "Questions presented."

FIRST GROUND FOR GRANTING CERTIORARI

The first question is an important one of Federal Law which has not been, but which should be settled by this Court, and the lower Court has decided it in a way probably in conflict with applicable decisions of this Court.

The lower Court in its opinion called attention to the Board's position "that the refusal to sign on the 23 N.M.U. men and the signing of the I.S.U. men in their stead, was in no sense an agreement then for a closed shop, but was merely a yielding by petitioner under the threat of a strike to the unwarranted demands of the I.S.U." (R. Vol I p. 179).

One month later this Honorable Court held in *U. S.* vs *Hutcheson* (Number 43 this Term) that it is perfectly legal for a labor union to call a strike for the purpose of compelling an employer to discharge from its employ members of another union.

The American Law Institute's Restatement of the Law of Tort §790 states:

> "Dismissal by an employer of an employee is a proper object of concerted action by his employees if the employee
>
> * * * * * *
>
> "(c) refuses to become or remain a member of a labor union satisfactory to them, or has been legally suspended or expelled from such union."

The National Labor Relations Act provides that nothing in the Act "shall be construed so as to interfere with or impede or diminish in any way the right to strike." Title 29 §163 U.S.C.

The Act also provides:

"That nothing ** shall preclude an employer

from making an agreement with a labor organization ** to require as a condition of employment membership therein **." Title 29 §158 (3) U.S.C.

Mr. Chief Justice Taney on page 572 of 14 Peters stated:

"The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented and upon which both are acting, it is an 'agreement'."

We submit that if the object of the strike is legal, then it necessarily follows that the compliance with the Union's demand is not a violation of the National Labor Relations Act. Such a compliance is the making of "an agreement" authorized by the Act.

To hold otherwise will greatly impair the right to strike. If an employer cannot comply with his employees' demand in this class of cases what use is the right to strike for those demands?

And what remedy has an innocent employer who as the Circuit Court of Appeals held tried to retain the former crew but was "made the victim of a dispute between rival labor unions." (R. Vol. I p. 177).

We submit that it is of great importance that this Honorable Court should set forth the employer's rights in this class of cases.

SECOND GROUND FOR GRANTING CERTIORARI

Erie Railroad v. *Tompkins* 304 U. S. 64, 78 declared:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts."

Six Companies of *Cal.* v. *Joint Highway District* (Number 267 this Term) held that the decision of an intermediate Appellate Court is just as binding as the decision of the State Supreme Court.

The contract in question was executed June 4, 1935. (R. Vol. II p. 127).

The National Labor Relations Act was not approved until July 5, 1935. There is nothing in that Act which required the National Labor Relations Board to approve these contracts.

This Honorable Court considered Article II §1 of this contract in *National Labor Relations Board* v. *Waterman Steamship Company.* In the *Waterman* case the seamen were refused reemployment at Mobile, Alabama. This Honorable Court in 309 U. S.

on page 219 and in f. n. Number 11 took its law from Alabama precedence and held that the contract merely required *Waterman* to give preference of employment to members of the I.S.U. as vacancies occurred and that no vacancy occurred by reason of the termination of a foreign voyage.

Your petitioner was not a party to the *Waterman* suit and, of course, is not bound by the judgment in that case.

So far as your petitioner is concerned the parties intended that the contract would be performed and it was performed at Savannah, Georgia. It was at Savannah, Georgia, that the seamen in question were refused reemployment.

Your petitioner contended and now contends that under the decision of September 30, 1931, in *Gary* vs *Central of Georgia Railway Company*, 44 Ga. Appeals 120, 125, it is the settled law of Georgia that the present contract contained an implied term requiring the seamen to retain their membership in the I.S.U. and that for a violation of this term your petitioner was required to discharge them.

The lower Court refused to consider this contention. It had just previous to the decision in the instant case held in *Illinois Central Railroad Company* vs *Moore* 112 Fed (2d), 959, that the doctrine of *Erie* vs *Tompkins* "applies only to local matters governed wholly by State law," and that a union contract applying in many states is not

such. "Its meaning and effect ought to be the same in each State." One Judge dissented and took the opposite view.

After the decision in the instant case this Honorable Court reversed the *Illinois Central* case. *Moore* vs *Illinois Central Railroad Company.* (Number 550 this Term).

But in reversing the lower Court this Honorable Court failed to approve either the majority view that the construction of a collective bargaining agreement was a question of general law or the minority view that it was a question of State law, with the result that this highly important question is now in confusion and should be settled by this Honorable Court.

THIRD GROUND FOR GRANTING CERTIORARI

At the time of the decision of the National Labor Relations Board in the instant case the Board consisted of Mr. Donald Wakefield Smith, Mr. Edwin S. Smith and Mr. J. Warren Madden. Mr. Donald Wakefield Smith took no part in the consideration of the Board's decision. (R. Vol. I p. 144) Mr. Edwin S. Smith's views that in every case where the Board finds that the National Labor Relations Act has been violated the Board must, without the exercise of any discretion, award reinstatement with back pay, were well expressed in the *Cape Cod Trawling* case decided April 25, 1940 and appearing as advance pamphlet Number 18 of Volume 23 of N.L.R.B.

In that case the employer's fishermen who were affiliated with the A. F. of L. threatened to strike unless the employer discharged its radio operators who were affiliated with the C.I.O. The employer complied with the fishermen's demand.

Mr. Edwin S. Smith and Mr. Madden held that this was a violation of the National Labor Relations Act. Mr. Smith there stated:

> "Conceding that the pressure from the Fishermen's Union placed the respondents in an unenviable position, the issue that we must face is whether the respondents, who have violated the law, or the three employees in question, who are blameless, should bear the burden of the respondents' actions. We can see no valid reason for shifting the loss caused by the respondents' unfair labor practices even though the unfair labor practices in turn arose out of matters beyond the respondents' control, from the respondents themselves to the victims of their unlawful acts, who are certainly less able to bear the burden."

Dr. Leiserson, who had taken Mr. Donald Wakefield Smith's place on the Board, dissented stating that in his opinion compliance with the fishermen's demand was not a violation of the National Labor Relations Act but that:

> "If, under this authority, the action of the respondents in the present case must be held to constitute technical unfair labor practices, the Act (Section 10 (c) still leaves to the discretion of the Board the determination whether the affirmative remedy of reinstatement with or without back pay would effectuate the policies of the Act."

No appeal was taken from this decision.

Mr. Madden's term has expired. The new Chairman has not expressed any views upon this subject. But in *National Labor Relations Board* cases Numbers C 1392-1393 January 4, 1941, not yet reported, and in which the new Chairman did not participate, Mr. Smith's views that the Board has no discretion and that it must necessarily award reinstatement with back pay whenever it finds that the Act has been violated, were reiterated. Dr. Leiserson stated that he felt he was forced to concur with Mr. Smith because of the majority ruling of the old Board in the *Cape Cod Trawling* case from which he had dissented.

No Court of any kind has passed upon this question. If this Honorable Court permits the present case to stand Mr. Smith's views as to a lack of discretion in the Board, will be considered as settled law, and Dr. Leiserson's view that the Board has a discretion, will be abandoned without ever having had its day in Court.

The other question raised by your petitioner in regard to the award of reinstatement with back pay will probably be settled by the decision of this Honorable Court in *N.L.R.B.* vs *Phelps Dodge Corporation* (Number 641 this Term) now under consideration.

FOURTH GROUND FOR GRANTING CERTIORARI

A ship owner is under a duty to grant per-

mission to the bargaining agent of its seamen to board its vessels to consult with the crew:

> "Since access of union representatives is necessary to the union's procedure of dealing with grievances of such unlicensed maritime personnel and no other methods afford such unlicensed personnel 'effective' opportunity to bargain collectively concerning grievances ***." *Cities Service Oil Co.*, et al., N.L.R.B. Nos. C-1270-1272. July 3, 1940. Reported U.S. Law Week Volume 9—Section 2, page 2037, July 16, 1940, not yet reported.

In the instant case the Board holds that if your petitioner grants passes to board its vessels to the bargaining agent of its employees it must grant similar passes to representatives of rival unions.

We submit that this important question should be settled, and an employer told what his duty is in this regard.

Respectfully Submitted:

EDWARD BRENNAN,
Attorney for Petitioner
P.O. Address: Savannah, Georgia.

ADAMS, DOUGLAS & BRENNAN,

W. WALTER DOUGLAS,
Of Counsel.

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CHARLES ELMORE CROPLEY
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No. 969

In the Supreme Court of the United States

OCTOBER TERM, 1940.

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

vs

NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

EDWARD BRENNAN
Savannah, Georgia
Attorney for Petitioner

ADAMS, DOUGLAS & BRENNAN
W. WALTER DOUGLAS
Of Counsel

INDEX

Page

Introduction ---- 1

Reasons for granting the writ:

Part I. Petitioner's right to comply with the I.S.U.'s demand ---- 2

Part II. The contract was to be performed in Georgia and should be construed in accordance with the laws of Georgia. The law of Georgia is that in such a contract there is an implied agreement that the members of the Union shall retain membership in the Union as long as they continue in the employ of the employer---- 7

Part III. The award of back pay---- 11

Part IV. The granting of passes---- 15

Appendix: National Labor Relations Act---- 17

CITATIONS

Cases:

American LaFrance Line et al 12 N.L.R.B. 766 et seq.---- 14, 15

Amalgamated Utility Workers vs *Consolidated Edison Company* 309 U.S. 261---- 13

Cape Cod Trawling Corporation Pamphlet No. 18 23 N.L.R.B. decided April 25, 1940---- 6

Cox vs *U. S.* 6 Peters 172---- 9

Gary vs *Central of Georgia Railway Company* 44 Ga. Apps. 120, 125 ---- 9, 10

Holmes vs *Jennison*, 14 Peters 540, 572, 573---- 4, 5

The Losmar, 20 Fed. Supp. 887---- 13

Mooremack Gulf Lines, Inc. N.L.R.B. Numbers C-1392 3 January 4, 1941 ---- 6

N.L.R.B. vs *Fansteel Metallurgical Corporation* 306 U.S. 240.- 12

N.L.R.B. vs *Waterman*, 309 U.S. 206---- 6, 8

Republic Steel Corporation vs *N.L.R.B.* ------U.S.------ decided November 12, 1940---- 13

The Saccarappa, 21 Fed. Supp. 417---- 13, 14

Smith vs *Jones*, 185 Ga. 236, 241---- 4

The Steel Trader, 275 U.S. 388---- 13

United Fruit Company 12 N.L.R.B. 404---- 3

U. S. vs *Hutcheson*, ------U.S.------ (No. 43 this Term)-- 5

U. S. vs *Rauscher*, 119 U.S. 407, 412, 413, 414---- 5

Statutes:

Title 29 §160 (c) U.S.C.A. Supp.---- 11

Title 46 §594 U.S.C.A.---- 13

Title 46 §1254 U.S.C.A. Supp---- 3

June 23, 1938, Amendment to Merchant Marine Act (c600 §45, 52, Stat. 965; Title 46 §1251 et seq., supplement to United States Code Annotated) ---- ---- 3, 11

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No._____

SOUTH ATLANTIC STEAMSHIP COMPANY OF DELAWARE, PETITIONER

vs

NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The petition for review filed with the Fifth Circuit Court of Appeals in this case (R. Vol. I p. 2) raised many questions, some of law, some of fact, and some mixed. Petitioner there, amongst other things, contended that assuming that the written agreement of June 4, 1935, (R. Vol. II pages 127, 129) should be construed according to the "general law" so that it merely provided for preference of employment; nevertheless by reason of the intention of the parties, their course of conduct and express oral agreements, the written contract was, in 1935, converted into one for a "closed shop."

Since that position involves questions of fact, petitioner does not now urge it. The petition for the writ of certiorari confines itself to four important questions of law.

One.

Petitioner's right to comply with the I.S.U.'s demand.

The first question was not passed upon by the National Labor Relations Board.

Notwithstanding petitioner's repeated requests (R. Vol. I pages 20, 93, 160, 161, 162) the Board failed and refused to make any findings of fact or of law in regard to the I.S.U.'s right on October 6, 1937, to demand with threat of strikes, that petitioner only reship members of that Union, and of petitioner's right to comply with that demand. But the facts are clear. The National Labor Relations Board has never contended that the petitioner and the I.S.U. could not have made a valid written close shop agreement on October 6, 1937. The position taken by the Board is stated by the Circuit Court of Appeals as follows: (R. Vol. I p. 179).

> "That the refusal to sign on the 23 N.M.U. men and the signing on of the I.S.U. men in their stead was in no sense an agreement then for a closed shop, but was merely a yielding by petitioner under threat of a strike to the unwarranted demands of the I.S.U."

The Circuit Court of Appeals held (R. Vol I p. 179):

> "We think it equally clear that petitioner's yielding to the threat of a strike and dis-

> charging these N.M.U. men under that threat was not intended by the parties to be nor was it the making of an oral closed shop agreement."

We can find nothing in the National Labor Relations Act nor in the decisions construing it which requires that a collective bargaining agreement be reduced to writing, in the absence of a request by one of the parties.

The Board has recognized that oral closed shop agreements are valid. Matter of *United Fruit Company* 12 N.L.R.B. 404.

While the June 23, 1938 amendment to the Merchant Marine Act (c 600 §45, 52 Stat 965; Title 46 §1251 et seq., supplement to United States Code Annotated) encourages the making of written agreements between ship owners and their employees, it does not invalidate oral agreements. (See Title 46 §1254 U.S.C.A. Supplement). Besides this amendment was not adopted until long after the present controversy arose.

Unquestionably on October 6, 1937, the mind of petitioner and the mind of the I.S.U. met. A complete understanding was had and the employees were publicly notified that petitioner would require as a condition of employment membership in the I.S.U.

We submit that this was an agreement authorized by the Act.

The Supreme Court of Georgia, in the case of *Smith* vs *Jones,* 185 Ga. 236, 241, states:

> "There are methods of expressing agreement other than by word of mouth. Conduct can be as articulate as language. An old adage declares that actions speak louder than words ***. Webster *** gives, as one of the definitions of the word 'agreement'. 'a concurrenee in an engagement that something shall be done or omitted.' The first definition of the word 'agreement' given by Bouvier is 'A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing.' 'But' continues Bouvier, 'the assent need not be formally made; it can be inferred from the party's act; L.R. 6 Q.B. 607; L.R. 10 C.P. 307; 90 Ala. 529 (8 So. 144)'."

This Honorable Court in the case of *Holmes* vs *Jennison* 14 Peters 540 had before it two questions, the second of which was the meaning of the word "agreement" appearing in Article I Section 10 Clause 3 of the Constitution of the United States, which prohibits any state, without the consent of Congress, from entering into any "agreement" with a foreign power. Mr. Chief Justice Taney, on page 572, stated:

> "The word 'agreement' does not necessarily import any direct or express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an 'agreement'."

And on page 573:

> "So an agreement, after Holmes had escaped to Vermont, written and signed by the State and provincial authorities, by which the Governor of Vermont engaged to seize him and deliver him up to the Canadian officers, would unquestionably, be unconstitutional. Yet precisely the same thing is done in this case without a regular and formal agreement. It is, in some way or other, mutually understood by the parties that he shall be seized and delivered up; and he is seized, accordingly, in order to be delivered up, pursuant to this understanding. Can it be supposed that the constitutionality of the Act depends on the mere form of the agreement?"

The Chief Justice then held, at the top of page 574; that the word "agreement" was broad enough to include agreements "either in writing or by parol, formal or informal.

Apparently on this branch of the subject the Chief Justice was speaking for the whole court. See *U. S.* vs *Rauscher,* 119 U.S. 407, commencing at the bottom of page 412 and continuing to the middle of page 414.

But if for any technical reason a valid "closed shop" agreement was not made on October 6, 1937, we nevertheless submit that since *U. S.* vs *Hutcheson* (Number 43 this Term) declares the demand of the I.S.U. was perfectly legal, then it necessarily follows that petitioner's compliance with that demand was likewise legal, and that the following views of Dr. Leiserson expressed in his dissent in

the *Cape Cod Trawling Corporation* case decided April 25, 1940, and appearing as advance pamphlet Number 18 of 23 N.L.R.B. are sound:

> "In view of this provision, I cannot believe that Congress intended the employer to be held guilty of an unfair labor practice when he is forced to dismiss an employee by a strike or by other legal concerted activities of union members."

The new Chairman has not expressed his views but Dr. Leiserson has considered that he has been overruled. In re *Mooremack Gulf Lines, Inc.* N.L.R.B. Nos. c. 1392-3 January 4, 1941, not yet reported.

The present case differs from the *Waterman* case. In that case there was no demand by the I.S.U.; there was no threat of strike; what Waterman did was apparently gratuitous.

With the prevalent widespread warfare between rival unions of the A.F.L. and C.I.O. to gain supremacy and in which the employer is frequently, as in the case at bar, made an innocent victim, it is vitally important that this Honorable Court determine the rights of the employer as to whether or not he violates any law when he yields to the demands of a union which is the bargaining agency of his employees and which threatens the employer with strike if the employer either employs or keeps in his employ members of the rival union and in this connection that this Honorable Court deter-

mine what constitutes a valid "closed shop' agreement under the National Labor Relations Act.

Two.

The contract was to be performed in Georgia and should be construed in accordance with the laws of Georgia. The law of Georgia is that in such a contract there is an implied agreement that the members of the Union shall retain membership in the Union as long as they continue in the employ of the employer.

In 1935, prior to the enactment of the National Labor Relations Act and prior to the organization of the N.M.U., petitioner, along with other shipping companies, entered into an agreement with the I.S.U., an A.F. of L. affiliate. (R. Vol I p. 176; Vol. II p. 127).

This agreement provided:

> "Article I Section 2 (e) *** every effort shall be made by the representatives of the Union and the Company involved amicably to adjust ** (b) *** any *** dispute or difference which may arise or exist between individual Shipping Companies and their employees covered by this agreement, or between said Companies and Union, or any other dispute or difference which may arise concerning the interpretation or performance of this agreement." (R. Vol. II p. 129).

The same paragraphs state that if the effort is unsuccessful the dispute or difference shall be submitted to a local Board of Arbitration.

Section 1 of the same Article (R. Vol. II p. 128) provides for an appeal to a District Board.

Paragraphs (d) and (e) of this section state that the decisions of the District Board shall be final and conclusive. "Appropriate disciplinary measures shall be taken against any employee and any supervisory official who acts in violation of any decision of the Board."

Article II Section 1 of the agreement (R. Vol. II p. 129) as construed by this Honorable Court in *N.L.R.B.* vs *Waterman* 309 U.S. 206 merely required that as vacancies occur preference of employment be given to members of the I.S.U.

The parties intended that petitioner would perform the contract at Savannah, Georgia, its headquarters and the home port of its vessels. If your petitioner had done what the United States Circuit Court of Appeals for the Fifth Circuit now holds it should have done on October 6, 1937, at Savannah, Georgia, petitioner would have been subject to a suit by the International Seamens Union of America brought in the Superior Court of Chatham County, Georgia, seeking damages and an injunction. We submit that, that Court would have followed the settled law of Georgia, and held that the plaintiff had breached its contract with the I.S.U. because that contract contained an implied term requiring the seamen to retain their membership in the I.S.U.

This Honorable Court should construe the contract according to the laws of Georgia, the place of performance,

Cox vs *U. S.* 6 Peters 172.

Gary vs *Central of Georgia Railway Company* 44 Ga. Appeals 120 on page 125 states:

> "It is unreasonable to suppose that the brotherhood or its officers would have continued to represent the plaintiff after his resignation from the organization, and undoubtedly they would have had no authority to do so in the absence of further action on his part conferring such authority upon them. Under the plaintiff's own theory of the case, the defendant had the right to expect that his membership in the organization would be continued, in order that he might be amendable to the rules and regulations of the brotherhood, under which he was employed, and remain subject to be dealt with through this organization for certain purposes referred to in the contract, and relating to the conditions of his employment. When he resigned from the organization he in effect abrogated certain material provisions of the contract between him and the defendant, and because of this breach on his part the defendant had the right to treat the contract as ended, and to be released from all future liability thereunder."

Article I Section 1 of the written contract provides for the mediation, conciliation and adjustment of any grievance, dispute or difference which may arise or exist between petitioner and its employees.

Paragraph (d) of that section provides that appropriate disciplinary measures shall be taken against any employee who acts in violation of any such decision.

Paragraph (e) of Section 2 of Article I provides that before submitting any matter for a decision "every effort shall be made by the representatives of the Union and the company involved amicably to adjust the same."

We submit that the instant case falls clearly within the Georgia rule for how can the I.S.U. represent a member of the N.M.U. in that members dispute with petitioner and how can the I.S.U. take appropriate disciplinary measures against that employee?

Such disputes are quite frequent and are usually settled by the Union delegate. (R. Vol. II pages 90, 100, 101).

In order that there can be no doubt as to the similarity of *Gary* vs *Central of Georgia Railway Company* and the case at Bar we have obtained from the Clerk of the Court of Appeals of Georgia exemplified copies of the record in that case and are filing them with the Clerk of this Court. This Honorable Court will notice that the contract there sued upon was contained in a pamphlet attached to an amendment and was simply a "schedule of wages, rules and regulations" agreed to by both the employer and the union. These rules did not require any employee to become a member of the union. These rules do not expressly prohibit any employee from leaving the union. Nevertheless the Georgia Court of Appeals held that Gary, who had been a member of the Union, was

impliedly required by these rules to remain a member of the union.

In the instant case petitioner had the right to expect that the crew, who had been hired under the collective bargaining agreement with the I.S.U., and had been furnished to petitioner by the I.S.U., would retain their membership in the I.S.U. in order that they might be amendable to the rules and regulations of the I.S.U. and remain subject to have their differences between petitioner and them dealt with through the I.S.U.

We submit that Congress has not taken over this branch of the law by reason of the National Labor Relations Act or by reason of the June 23, 1938, amendment to the Merchant Marine Act, but if it has that is immaterial.

The National Labor Relations Act was adopted after the contract was executed. There is nothing in that Act relating to the form or the filing of collective bargaining agreements.

The amendment to the Merchant Marine Act was adopted after this controversy arose.

Three.

The award of back pay.

Title 29 §160 (c) U.S. Code Annotated Supplement provides:

> "*** the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person

> to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this chapter ***."

The 6th headnote to the case of *N.L.R.B.* vs *Fansteel Metallurgical Corporation* 306 U.S. 240 states:

> "An order of the National Labor Relations Board requiring reinstatement of employees must be supported by specific findings."

Despite the fact that Petitioner was made the innocent victim of a dispute between rival Labor Unions, the Board imposed the severest penalty which the law permitted.

There is no finding of the Board in this case which would authorize the Court to say that the Board exercised a discretion or deemed it necessary to award reinstatement and back pay so as to effectuate the policies of the Act. Since the present decision was by Mr. Edwin S. Smith and Mr. Madden presumably the order for reinstatement and back pay followed their views (quoted on page 16 of the petition for the writ of certiorari) that when the National Labor Relations Board has found that an employer has in violation of the Act dismissed employees, the Board must without the exercise of any discretion and as a matter of course, order reinstatement with back pay; that the discharged

employees are as a matter of right entitled to such an award.

We submit that these views have been condemned in *Republic Steel Corporation* vs *N.L.R.B.* decided by this Honorable Court on November 12, 1940.

The National Labor Relations Act does not give to the seamen or to any private party any private rights. *Amalgamated Utility Workers* vs *Consolidated Edison Company* 309 U.S. 261.

If the seamen had been unlawfully discharged they would have been limited to an extra month's wages as compensation. 46 U.S.C.A. §594. The Steel Trader 275 U.S. 388; The Losmar 20 Fed. Supp. 887.

But the seamen had libelled the S/S "Saccarappa" alleging that they were illegally discharged. The case was tried at Charleston, South Carolina, within the Fourth Circuit, and Judge Myers, there stated:

> "Examination under oath of one of the libelants, and subsequent admissions of fact developed that libelants, having been paid off and discharged in the port of Savannah, under the terms of the shipping articles which they had signed, desired to sign up for the contemplated foreign voyage, and were referred to the representatives of the Union furnishing the crew under contract, which representatives refused to sign them on, admittedly because of their change of affiliation from the International Seamens Union, of which they had previously been members, to membership in the rival union known as the Na-

tional Maritime Union, an affiliate of the Committee for Industrial Organization.

"It would be rather a strained construction of the Labor Relations Act in the respects relied upon to hold that these facts show any interference, restraint or coercion of the employees in the rights guaranteed to them under Section 7 of the National Labor Relations Act (29 U.S.C.A. §157), or any discrimination for the purpose of encouraging or discouraging membership in any labor organization, as prohibited by paragraph 3 of Section 8 (29 U.S.C.A. §158 (3)). In any event, Section 10 of said Act, (29 U.S.C.A. §160) provides that any unfair practices listed in section 8 (29 U.S.C.A. §158) are reviewable solely by the National Labor Relations Board, created by section 3 of said act (29 U.S.C.A. §153) with the exclusive power unaffected by 'any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.'

"I therefore find that the libelants were not wrongfully and unlawfully laid off, or their services discontinued, in violation of the National Labor Relations Act in the respect relied upon; nor were they, as alleged, put out of employment by any willful and coercive attempt to force or encourage them to become members of the said labor Organization." The Saccarappa 21 Fed. Supp. 417.

This Honorable Court will note that petitioner is ordered to pay almost four years back wages.

The National Labor Relations Board of its own motion on May 18, 1939, dismissed the election proceedings, 12 N.L.R.B. 766 et seq., because of the

long lapse of time from the voting of petitioner's vessels, which had been completed in November, 1937.

We respectfully submit that the present record clearly indicates the failure by the Board to exercise any discretion.

The statute clearly states that the Board is at liberty to either award back pay or not award back pay. But if it awards back pay it must first find that such an award is necessary to effectuate the policies of the Act.

Fourth.

The granting of passes.

The seamen on the last of petitioner's vessels voted on November 28, 1937. (R. Vol. II p. 126). The result was formally declared in an intermediate report on December 14, 1937. (R. Vol. II p. 127).

The amended charge of January 7, 1938, alleged that petitioner had illegally denied passes to the N.M.U. (R. Vol. I p. 38).

The election was formally dismissed by the Board of its own motion, because of the lapse of time, on May 18, 1939. (12 N.L.R.B. 766 et seq.).

The Board on May 31, 1939 (R. Vol. I. pages 120, 144) issued its orders directing your petitioner to grant passes to board its vessels to the N.M.U. and other unions under the same conditions that it grants passes to the I.S.U. and its successors. No election was then pending.

It is respectfully submitted that an employer is entitled to know his rights and duties in regard to the issuance of passes to board its vessels to representatives of various unions.

Conclusion.

For the reasons urged in the petition and in this brief petitioner submits that this case is one in which a writ of certiorari should issue.

Respectfully Submitted:

EDWARD BRENNAN
Attorney for Petitioner
P. O. Address: Savannah, Georgia.

ADAMS, DOUGLAS & BRENNAN,

W. WALTER DOUGLAS,
Of Counsel.